**UNITED STATES PATENT AND TRADEMARK OFFICE**
**Trademark Trial and Appeal Board**
**2900 Crystal Drive**
**Arlington, Virginia 22202-3513**

Lykos

Mailed: April 26, 2004

Opposition No. 91151757

Columbia Insurance Company and H.H. Brown Shoe Co., Inc.

v.

Lenworth Alexander Hyatt

Before Seeherman, Hanak and Hairston, Administrative Trademark Judges.

By the Board:

This case now comes up for consideration of applicant's motion for relief from final judgment pursuant to Fed. R. Civ. P. 60(b)[1] and request to amend his application. Opposers have filed a brief in opposition thereto.[2]

By way of background, applicant filed an application to register the design mark of a crown for "clothing for men, women, children and infants, namely; footwear, pants,

[1] Applicant has also sought relief pursuant to Trademark Rule 2.142(g). Inasmuch as this provision applies only to *ex parte* appeals and not to *inter partes* proceedings, it cannot serve as a basis for setting aside the Board's final judgment.

[2] Inasmuch as applicant's reply brief was untimely, it has been given no consideration. *See* Trademark Rule 2.127(a). No extensions of time are permitted for reply briefs. *Id.*

headwear, underwear, swimwear, lingerie, shirts, jackets, socks, dresses, blouses, stockings, sweaters, blazers, pajamas, robes, trench coats, sports jerseys, gloves, overall (sic), skirts, jump-suits, leotards, tank-tops, neck-ties, bow-ties, shorts, suits, scarves, handkerchiefs, vest, shawls, blazers" in International Class 25.[3]

On February 13, 2001, opposers filed a notice of opposition on the grounds that applicant's mark, when used on the identified goods, so resembles opposers' previously used and registered mark, as to be likely to cause confusion, mistake or deception. Opposers' pleaded registration is for the design mark of a crown for "footwear" in International Class 25.[4]

On May 15, 2003, the Board granted opposers' motion for summary judgment on the issues of priority of use and likelihood of confusion, sustained the opposition, and refused registration of applicant's mark. The Board, in making its determination, found no genuine issues of material fact that opposers had priority in view of their pleaded Registration No. 1981495, which was made properly of record; that the goods of the parties are in part identical

[3] Intent to use application Serial No. 76242606, filed April 17, 2001.

[4] Registration No. 1981495, registered on June 18, 1996, and alleging March 5, 1994 as the date of first use anywhere and in commerce.

inasmuch as opposers' registration is for footwear and footwear is one of the items listed in applicant's identification of goods; that applicant, by failing to respond to opposers' first set of requests for admission, was deemed to admit that his mark is confusingly similar to opposers' mark; and that even if the Board were to not treat opposers' requests for admission as admitted, the parties' respective marks are indeed highly similar designs of crowns. In its order, the Board also addressed applicant's assertion that he never received the discovery requests by noting that opposers' certificate of service served as *prima facie* proof of service under Trademark Rule 2.119(a).

Fed. R. Civ. P. 60(b)(1),[5] made applicable to Board proceedings by Trademark Rule 2.116(a), provides in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect . . .

In Board proceedings, Rule 60(b) applies to all final judgments issued by the Board, including default and consent

[5] Applicant does not indicate which subsection of Rule 60(b) he relies on in bringing his motion. Subsections (b)(2)-(5) are inapplicable to the circumstances at hand. Given that applicant's motion was filed within one year of final judgment, and based on the presented arguments, we have analyzed the motion under subsection (b)(1). To the extent that applicant intends to rely on subsection (b)(6), we would have reached the same result.

judgment, summary judgment, and judgment entered after trial on the merits. Relief from a final judgment is an extraordinary remedy to be granted only in exceptional circumstances. The determination of whether a motion under Rule 60(b) should be granted is a matter which lies within the sound discretion of the Board. *See Case v. BASF Wyandotte,* 737 F.2d 1034, 222 USPQ 737 (Fed. Cir. 1984); *General Motors Corp. v. Catalog Club Fashions Inc.,* 22 USPQ2d 1933 (TTAB 1992). *See also* TBMP § 545. Where a motion for relief from judgment is made without the consent of the adverse party or parties, the moving party must persuasively show (preferably by affidavits, declarations, documentary evidence, etc.) that the relief requested is warranted for one or more of the reasons specified in Rule 60(b).

After carefully considering the parties' arguments and submissions, we find that applicant has failed to demonstrate that the previous judgment order should be vacated pursuant to Fed. R. Civ. P. 60(b)(1). The Board's findings that a likelihood of confusion exists between opposers' and applicant marks and that opposers have priority of use was not based on any of the reasons suggested by applicant, such as racial bias against applicant on the part of Board members or typographical errors in opposers' summary judgment motion. Rather, the

determination was based on the established facts that opposers had used the mark in their pleaded registration prior to the earliest date on which applicant may rely; i.e., the filing date of applicant's application; that certain of the goods in question, namely footwear, were identical; and that the parties' marks were confusingly similar. Those findings are factually supported by substantial evidence in the record, and are legally correct. Moreover, the fact that applicant routinely returns correspondence addressed from attorneys without opening such correspondence cannot serve as a basis for relief from final judgment.

Accordingly, we find that applicant has not sustained its burden of demonstrating that relief is warranted under Rule 60(b)(1) and its motion for relief from judgment is denied. The Board's May 15, 2003 order sustaining the opposition and refusing registration of applicant's mark stands.

In view of the foregoing, applicant's request to amend his application is moot.